1978

Common Cause of Utah et al v. Utah Public Service Commission et al : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

COMMON CAUSE OF UTAH, an unincorporated association by MARJORIE J. THOMAS, on behalf of its members and MARJORIE J. THOMAS, an individual,

Plaintiffs and Respondents,

-v-

UTAH PUBLIC SERVICE COMMISSION and MILLY O. BERNARD, OLOF E. ZUNDEL, and KENNETH RIGTRUP, in their capacities as Commissioners of the UTAH PUBLIC SERVICE COMMISSION, real parties in interest,

Defendants and Appellants,

MOUNTAIN FUEL SUPPLY COMPANY, intervenor.

CASE NO. 15685

BRIEF OF APPELLANTS'

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT FOR SALT LAKE COUNTY
THE HONORABLE PETER F. LEARY, DISTRICT JUDGE

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APPELLANTS' BRIEF

NATURE OF CASE

This is an appeal by defendants' (hereinafter appellants) from an Order of the Third Judicial District Court, The Honorable Peter F. Leary, District Judge, granting respondents' Motion for Summary Judgment on all issues and denying appellants' Motion for Summary Judgment in accordance with the orders and memoranda of the Court filed

on January 4, 1978, and January 5, 1978, and judgment entered in favor of respondents and against appellants, dated January 23, 1978, declaring the Utah Public Service Commission to be subject to the Open and Public Meetings' Act, Utah Code Annotated, Section 52-4-1, et seq., when said Commission deliberates, votes upon, establishes, or otherwise evaluates existing or proposed public utility rates, tolls and charges, rentals or classifications.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Order of the Third Judicial District Court and a declaration of this Court that the Utah Public Service Commission is not required to deliberate, vote upon, establish or otherwise set existing or proposed public utility rates, tolls, charges, rentals or classifications in open public meetings, pursuant to Utah Code Annotated, Section 52-4-1, et seq.

STATEMENT OF FACTS

The parties hereto have stipulated to the following facts which were taken as true for the purposes of the lower court's action:

1. Appellant Public Service Commission admitted that the Legislature has the power and authority to set and determine utility rates, and that such power and authority have been delegated to the Utah Public Service Commission.

2. Appellant Public Service Commission admitted that it is a "public body" which conducts "meetings" as those terms are defined in the Open and Public Meetings' Act. Section 52-4-1, et seq.

3. Appellant Public Service Commission admitted that respondents and the general public are excluded from those

meetings of the Public Service Commission, wherein the commissioners deliberate and vote upon the setting of rates but deny that respondents or the public have any right to attend such meetings.

4. Appellant Public Service Commission asserted that any requirement that the Commission deliberate and vote upon the setting of rates in public is unconstitutional and a violation of the due process provision of the 14th Amendment of the Constitution of the United States and Article I, Section 7 of the Utah Constitution.

5. That if the respondents, or either of them, requested permission from the Commission, or any of the Commissioners thereof, to attend any of the deliberative sessions described in paragraph (3) above, such request would be denied.

6. The parties stipulated that the exemptions to the requirements of the Open and Public Meetings' Act contained in Section 52-4-5, Utah Code Annotated (1953), as amended, are not in issue in this action.

Respondents seek only to establish that the Utah Open and Public Meetings' Act applies to the Public Service Commission "only when that body is establishing utility rates." TR-200 (p.24) The Lower Court received a copy of the Commission's Rules of Practice and Procedure which contain references to the Utah Rules of Civil Procedure and also the Utah Rules of Evidence. (P.62) (TR-238)

Appellant Public Service Commission regularly conducts proceedings upon written applications of various parties, usually utilities, to establish rates and classifications. The proceedings are judicial in nature, in that the parties are represented by legal counsel in an adversary setting. Opening statements are made regarding the law and facts. Conflicting testimony of experts sworn under oath and exhibits are presented, pursuant to Commission rules and the Utah Rules of Evidence and Civil Procedure.

The testimony is usually subjected to cross-examination by the opposing legal counsel. Legal counsel may and usually do make legal objections to testimony and motions which must be ruled upon by appellants. After the presentation of the evidence, the opposing counsel make final summations of the law and facts, and the matter is submitted to appellants for deliberation and their decision. Findings of facts and conclusions of law, together with an order, are issued which are appealable on the record to the Utah Supreme Court.

The lower court ruled in effect that appellants must deliberate openly in public during the time they are called upon to weigh the evidence and conflicting testimony to render a decision and order.

ARGUMENT

POINT I

THE PROPERTY RIGHT OF THE CITIZENS OF THE STATE OF UTAH ARE IMPAIRED IF THE QUALITY OF THE DECISION BY THE PUBLIC SERVICE COMMISSION IS COMPROMISED BY ABANDONING THE ANCIENT PROCESS OF CLOSED JUDICIAL DELIBERATIONS AND DECISION-MAKING.

The Open and Public Meetings' Act (also known as the "Sunshine Law"), Utah Code Annotated, Section 52-4-1 (1953), et seq, provides generally that every meeting be open to the public unless closed pursuant to statute. The Public Service Commission is not directly referred to by sai statute but only as its general terms may apply to any State agency or po ical subdivision.

The Public Service Commission is charged with the regulation of all public utilities operating in the State of Utah. Chapter 7 of Title 54 governs hearings, practice and procedure before the Commission. Provision is made for complaints to be filed against public utilities as well

as complaints to be filed by public utilities against other parties. Appellant Public Service Commission also receives applications for rate structures. In hearings before the Commission on such complaints and applications, evidence is received and a decision is reached by the Commission on both the facts presented and the applicable Utah law. (Utah Code Annotated, Section 54-7-9, 10, 11, 12 and 14.) The rights of the parties to these hearings are adjudicated and become final (Utah Code Annotated, Section 54-7-14) subject only to review by the Utah Supreme Court. (Utah Code Annotated, Section 54-7-16) The Commission conducts all its meetings and hearings in open, which the news media and the general public at large may observe. The hearings are conducted in an adversary setting with opposing legal counsel representing the various parties in interest. After the Commission has received the legal arguments, the sworn testimony and the exhibits and evidence, pursuant to the Commission's rules and the Utah Rules of Evidence, the Commission then retires to its chambers to deliberate the proceedings. During the deliberation, the Commission must weigh the evidence and determine the credibility of witnesses in establishing usually controverted facts which would justify an increase in a rate structure or justify a complaint well taken against a party. It is only the "deliberations" of the Commission being conducted in an open meeting in issue in the instant case.

Utah Code Annotated, Section 13-1-1.3 (1953), provides, in part:

> "The public service commission as established by 54-1-1, is continued in existence with the department of business regulation. The public service commission shall not exercise administrative authority over the division of public utilities or over any other division within the department of business regulation; ... . The public service commission shall not be subject to the jurisdiction of the executive director of business regulation in regard to the exercise of its quasi-judicial or rule-making functions within the department, except that the executive director of business regulation if he is also a member of the public service commission shall participate in deliberations and decisions of the public service commission as may any other member. The public service commission shall exercise all quasi-judicial and rule-making powers in regard to public utilities as provided in Title 54... ." (Emphasis added.)

The Supreme Court of the United States has held that judicial powers may be conferred upon an administrative agency. (See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940), Reconstruction Finance Corp. v. Bankers Trust, 318 U.S. 163, 63 S Ct. 515, 87 L.Ed. 680 (1943)).

It could not be any clearer that the Legislature intended that the Public Service Commission exercise functions that are quasi-judicial in nature and independent of the executive administrative authority of th Department of Business Regulation. It is, therefore, submitted that the specific wording of Utah Code Annotated, Section 13-1-1.3 (1953), takes precedence, although earlier in point of time over the general language o the Open and Public Meetings' Act, in particular, Utah Code Annotated, Se tion 52-4-3 (1953). Nelden v. Clark, 20 U. 382, 59 P. 524 (1899); Pacif Intermountain Express Co. v. State Tax Com., 7 U.2d 15; 316 P.2d 549 (19

There is no real difference in the deliberations of the Public Service Commission than that of a jury or multi-judge court. Facts must be found by weighing evidence and examining exhibits, and the law must be applied to the facts as found. It cannot be presumed that the Legislature intended to include the judicial or quasi-judicial functions within the scope of Utah Code Annotated, Section 52-4-2 (2), since it repealed none of the pertinent sections of Title 54 and did not extend the application of the Open Meetings' Act to courts and judicial functions. Had it done so there would be a serious constitutional question raised as to an unlawful intermeddling by the Legislature into the judicial powers vested in the courts. The Utah Constitution, Art. I, Section 24, provides that all laws of a general nature shall have uniform operation.

It is a common rule of law that the Legislature cannot delegate essential legislative functions. While it might be said that the Public Service Commission in setting utility rates and adjudicating rights of parties may be performing a legislative function, said function is either a "nonessential" legislative function or is being performed in violation of Article IV, Section 1, which vests the legislative powers of the State in the Senate and House of Representatives and the people. (See, generally, Lloyd A. Fry Co. v. Utah Air Conservation Commission, 545 P.2d 495.)

Accepting for purposes of argument that the essential nature of

the rate-making function of the Commission is quasi-legislative in substance, it certainly is clear that it performs the major portion of that function through quasi-judicial procedures, rather than quasi-legislative procedures. It is significant that no action of the Legislature is appealable directly to the Supreme Court on the record as is the decision of the Public Service Commission in adjudicating rates and classifications. The Open and Public Meetings' statute deals with "procedural" rather than substantive law. Hence, the crucial determination is whether the procedural requirements of the Sunshine law may be applied to proceedings which are essentially judicial in nature.

The Arizona Supreme Court decided a similar issue involving the concept of exercising quasi-judicial power in the case of Arizona Press Club, Inc. v. Arizona Board of Tax Appeals, Div. 1, 113 Ariz. 545, 558 P.2d 697 (1976). In that case, the Arizona Press Club and Common Cause alleged that a three-member tax appeals commission was subject in their deliberations to the Open Meetings' Act. In holding that the Board of Tax Commissioners were not subject to the Act, the Court stated:

> "When an administrative agency is exercising its quasi-judicial power, it does not necessarily follow that it acts quasi-judicially. It either acts judicially or it acts administratively. The procedures prescribed by the statute and followed by the board of tax appeals in hearing the parties in open forum, taking the matter under advisement, deliberating, writing a written decision and making that decision available to the parties and the public, follow the classic procedures of an appellate court in making a

judicial decision. We believe that this is a 'judicial proceeding' within the meaning of the statute."

The realistic, pragmatic reasons for exempting the Public Service Commission from the operation of the Act are that it would be impossible for a commissioner within the context of his open deliberations to voice to the other commissioners that he did not believe one witness in deference to another witness. Likewise, it would be difficult to admit that a commissioner in fact did not understand a significant phase of the proceeding, such as the application of depreciation rules or capitalization concepts to a rate structure. The free exchange of information between commissioners in weighing the rules of law applicable would not exist if said commissioner knew that he would be subject to political influence at the end of the term when the question of his appointment to office was being considered. In general, the consumers and citizens of the State of Utah would suffer by the undue influence that utilities could exercise over commissioners, either through the political process or through constant refinement of the adversary process directed towards any individual commissioners' predispositions.

It is well settled that the constitutional guarantee of due process of law applies to proceedings which are quasi-judicial in nature.

"The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings, particularly

where such proceedings are specifically classified as judicial or quasi-judicial in nature... ." (Am. Jur. 2d Administrative Law, Section 351, p. 163)

The Utah Supreme Court has also made this principle clear. Salt Lake County v. Public Service Commission, 29 Utah 2d 386, 510 P.2d 923 (1973). This Court has consistently held that Commission orders will be set aside where fundamental due process rights have been violated. Morris v. Public Service Commission, 7 Utah 2d 167, 321 P.2d 644 (1958).

As already indicated, the Commission acts as a decider of fact and of law. The deliberation process of the Commission is identical to that of any petit jury. It must weigh evidence and this most assuredly includes the determination of the credibility of witnesses. Imagine the headline if deliberations were open to the press:

"PUBLIC SERVICE COMMISSION BELIEVES UTILITY PRESIDENT A BOLD-FACED LIAR."

But, of course, such a headline would never appear because, in the presence of the public, the commissioners would not engage in an open, full discussion on the credibility of witnesses. An article at 75 Harvard Law Review, 1199, points out some of the other problems involved in opening such deliberations to the public. Among them are:

(1) Officials are often reluctant to request information at public meetings lest they create a public image of ignorance. The chief editorial writer of the Chicago Sun-Times explained it this way:

"It is not so much an unwillingness to express public views that accounts for the desire for secrecy as it is the need to cover up just plain ignorance that so many public officials have. That is the basis for one argument for secret meetings that might have some validity ... . In a secret meeting a public official can honestly confess ignorance of a subject and seek enlightenment from his fellow committee members and witnesses. He would not be able to bring himself to do this in a public meeting and such reluctance might have an adverse effect on the proceedings." (Letter to the Harvard Law Review, Nov. 28, 1961.)

(2) Public officials are prone to waste time making speeches for the benefit of an audience. This could easily arise in the Public Service Commission context as commissioners would be inclined to attempt to justify positions they perceived as unpopular.

(3) An official hesitates to abandon a view that he has publicly advocated. Once a commissioner takes a stand in open deliberations on a particular issue, it is just plain human nature to cling to that position, even if the commissioner is later convinced that he or she was wrong initially.

(4) The press tends toward "sensational" reporting. All too frequently newspaper stories are distorted by the bias of the reporter or his paper. It is not inconceivable that extensive coverage of this type could give rise to the Commission bowing to intense public pressure--pressure generated by a misinformed or misled public.

Other problems associated with open deliberations were discussed by the 4-to-1 majority of the Arizona Supreme Court in Arizona Press Club v. Board of Tax Appeals, supra. As previously noted, this case involved

a fact situation almost identical to the case at bar. The Court said:

> "We do not believe that the legislature intended to exempt only court 'judicial proceedings' and not administrative agency 'judicial proceedings.' To allow the public to attend the deliberations leading to a decision and to watch the writing of that decision would not, we believe, promote the ends of justice. We agree with the dissent of Justice Dekle in the case of Canney v. Board of Publ. Instruction of Alachua Cty., 278 So.2d 260 (Fla.1973), when he stated:
>
> > '... Those rights of persons and property involved in a hearing should be preserved in a judicial atmosphere which is essential to a fair and impartial deliberation upon the rights involved. To afford less in such a judicial type of proceeding would be a denial of due process and of a fair hearing in which a person's rights and interests are at stake, as much as if he were before a judicial tribunal. We might as well return to the Roman Arena for a 'thumbs up or thumbs down' result by the public clamor if we are to eliminate the judicial protections and safeguards in matters of this kind.
> >
> > * * *
> >
> > 'The result of depriving an administrative body of free deliberation among themselves, just as a regular judicial body or jury may do, is to shut off the free flow of discussion among them and an exchange of ideas and an open discussion of differing views to the end that a fair and just result may be reached by the body based upon the evidence and arguments at the hearing. Ask any juror. The answer will be that the free interchange and discussion among the group is essential to a fair and just conclusion of the interests before them for decision. This is not the area in which one

> need fear the alleged 'private deals' and extraneous considerations to the matter at hand, so that really the asserted reason undergirding the sunshine law is not present in a judicial deliberation of a matter before an administrative board for a review of judicial character. The basic concept of the 'right of the public to know' is fulfilled upon reaching such a fair and just result which is then publicly conveyed.'" 278 So.2d at 264-265.

The Wyoming Supreme Court agrees with these principles. In School District No. 9, in County of Fremont v. District Boundary Board in and for Fremont County, 351 P.2d 106, the Court considered the claim that a zoning and boundary board should be required to deliberate in public. The Court stated:

> "However, the very nature of the activities of quasi-judicial meetings be open to interested persons; and it has been held that even where there is no statutory requirement for notice of the proposed action in changing a school boundary reasonable notice is required to be afforded to interested persons. (Citations omitted.)
>
> "The right of the public to be aware that the hearings of such boards will take place and to present evidence before them should not prohibit such boards from having private sessions for planning or deliberations." (Id. at 110.)

It is important to note that respondents' claim for relief is based entirely on the Utah Open Meeting Act. They claim no constitutional nor common-law right to attend Commission deliberations. Appellants have shown that parties before the Commission enjoy the constitutionally quaranteed right of due process of law. Appellants have also shown that an opening of the Commission's deliberations would surely give rise to claims of due process violations by such parties. Appellants, therefore, respectfully

submit that the right to due process of law guaranteed by Art. I, Section 7 of the Utah Constitution, and the 14th Amendment of the U.S. Constitution, precludes deliberations of the Commission from being open to the public. The Commission should not be required to compromise the quality and integrity of its decisions by discussing and deciding the matters in open public spectacles.

POINT II

SECTION 54-3-21 (4), UTAH CODE ANNOTATED (1953), VESTS ABSOLUTE DISCRETION IN THE COMMISSION TO DETERMINE WHEN INFORMATION MAY BE WITHHELD FROM THE PUBLIC.

Section 54-3-21 (4), Utah Code Annotated (1953), provides:

* * *

> "(4) Hearings or proceedings of the commission or of any commissioner shall be open to the public, and all records of all hearings or proceedings or orders, rules or investigations by the commission or any commissioner shall be at all times open to the public; provided, that any information furnished the commission by a public utility or by any officer, agent or employee of any public utility may be withheld from the public whenever and during such time as the commission may determine that it is for the best interests of the public to withhold such information. Any officer or employee of the commission who in violation of the provisions of this subsection divulges any such information is guilty of a misdemeanor."

It is interesting to note that this provision, the violation of which is a crime, was not repealed when the Legislature passed the Open Meetings Act. It is also interesting to note that the Commission could invoke this statute whenever it pleased in order to close any of its

deliberations. It could simply state that it was going to discuss the type of information specified by the statute, and that it had determined that the public interest would be served by closing the meeting. Inasmuch as the Legislature did not expressly repeal this provision, the Open Meeting Act must be construed to effectuate its operation consistent with the previous legislation. (Sands, Sutherland's Statutory Construction, Sec. 23.10, p. 231.)

Respondents might argue that Section 54-3-21 (4) was impliedly repealed with the passage of the Open Meetings Act. Such an argument would clearly be untenable.

> "Interpretation of statutes with regard to the question whether they effect repeal of prior law by implication is conditioned by a judicially formulated and imposed assumption, or presumption, against change in the legal order. Court reports abound in decisions reflecting and endorsing a presumption against repeal by implication." (Sands, Sutherland's Statutory Construction, Sec. 23.10, p. 230, and a plethora of case cited thereunder.)

73 Am.Jur. 2d, Statutes, Sections 396 and 397 provides:

> "Repeals by implication are not favored. Thus, an intent to repeal by implication, to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative, must be necessary, or necessarily follow from the language used, because the first or dominant statute admits of no other reasonable construction. Moreover, if two constructions are possible, that one will be adopted which operates to support the earlier act, rather than to repeal it by implication.
>
> "The courts will not presume that the legislature intended a repeal by implication. Indeed, the presumption is always against the intention to repeal where express

terms are not used, and where effect can reasonably be given to both statutes. The presumption rests on the improbability of a change of intention, or, if such change occurred, on the probability that the legislature would have expressed it with an express repeal of the first." (Footnotes omitted.)

The Legislature provided the Commission with a vehicle by which it could keep information secret. That vehicle has not been repealed, either expressly or impliedly.

POINT III

DECISIONS OF OTHER JURISDICTIONS SUPPORT APPELLANTS' POSITION THAT THE PUBLIC SERVICE COMMISSION IS EXEMPT FROM THE OPEN AND PUBLIC MEETINGS' ACT DURING ITS JUDICIAL "DELIBERATIONS."

There appear to be many cases across the country reaching opposite conclusions on the applicability of the Open Meetings' Act in general to commissions which exercise highly visible judicial functions, such as appellant Public Service Commission. Appellants submit that the better-reasoned position is that the Public Service Commission, in following judicial procedures and exercising a judicial function which the Legislature would be required to do itself if it were setting rates, is exempt from the operation of the Open and Public Meetings' Act in order to preserve the integrity of the judicial process:

In Canney v. Board of Public Instruction of Alachua County, (1 278 So.2d 260, three justices dissented from the four-judge majority, holding that even though the school board was acting in a "quasi-judicial" capacity in deciding whether a student's suspension should be continued, the board was a part of the legislative branch of government and the "Sunshi

Law" was violated when the board recessed the hearing to reach a decision. The majority concluded that as a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties, and, under the separation of powers doctrine, the Legislature may not authorize officers or bodies to exercise powers which are essentially judicial in their nature. The Court stated that the characterization of a decisional-making process by an administrative board as "quasi-judicial" does not make the body into a judicial body, and that the intent of the Legislature in passing the "Sunshine Law" was to cover any gathering of some of the members of a public board where those members discuss some matters on which foreseeable official action will be taken by the board.

The dissent in Canney argued that "/t/he Legislature itself has recognized its grant of quasi-judicial powers to various boards and agencies as 'something apart' from those agencies' principal functions, and that they are to be treated in a different manner." 278 So.2d at 264. The dissent illustrated this point by noting that the Legislature adopted the Administrative Procedure Act, which provided for the procedure regulating the exercise of quasi-judicial power by the agencies (much like court rules). The dissent stated that:

> "... It is apparent that such distinctive quasi-judicial activity was never intended to be melded into an agency's regular duties and responsibilities and thereby treated in a 'nonjudicial' manner in its consideration. I believe that the Legislature is as conscious as anyone in preserving private rights and due process of

individuals who may come before a board or agency, and that the Legislature intended to insure that those rights were afforded in accordance with due process in a judicious manner, as reflected by adoption of the Administrative Procedure Act for state agencies.

"The regular activities of an agency and those which are quasi-judicial are altogether different. Those rights of persons and property involved in a hearing should be preserved in a judicial atmosphere which is essential to a fair and impartial deliberation upon the rights involved. To afford less in such a judicial type of proceeding would be a denial of due process and of a fair hearing in which a person's rights and interests are at stake, as much as if he were before a judicial tribunal... ."
278 So.2d at 264. (Dissent)

The dissent further stated that it is not necessary to have an express exception in the "Sunshine Law," but that the quasi-judicial function stands independently without having to be excepted anymore than courts, as judicial bodies, need to be express exceptions to that law.

"... This is recognized as the judicial protection basically afforded to all persons. The simple fact that such quasi-judicial proceedings are not fully judicial does not deprive them of their basic constitutional protections and safeguards to the individuals or properties involved in that type of proceeding. And it is fully judicial for the particular proceeding, insofar as the matter involved is concerned."
278 So.2d at 265. (Dissent)

According to the dissent, it is unnecessary

"... that administrative agencies become actual full-fledged judicial bodies in order to function in a judicial atmosphere. To hold otherwise diminishes the constitutional right to a judicial consideration by quasi-judicial bodies in matters fully as important as those which may come before a full-fledged judiciary. They do not change in their importance and protection by virtue of being heard

by a body whose regular duties are otherwise, when that body convenes in a proceeding which is judicial in nature. If this is not recognized it will destroy the traditional quasi-judicial functions of enumerable bodies and important agencies considering questions of vital and far-reaching effect."
278 So.2d at 265. (Dissent)

The dissent expressed the fear that the majority holding would invite Federal intrusion in areas where the state would be neglecting the constitutional rights and privileges of those persons and property interests involved in quasi-judicial hearings or proceedings. It was also feared that the open exchange of views and a free flow of expression might be cut off if the administrative body was deprived of free deliberation among its members. It was contended that the free interchange and discussion among the members are essential to a fair and just conclusion of the interests before them for discussion. The dissent concluded that:

"... This is not the area in which one need fear the alleged 'private deals' and extraneous considerations to the matter at hand, so that really the asserted reason undergirding the sunshine law is not present in a judicial deliberation of a matter before an administrative board for a review of judicial character. The basic concept of the 'right of the public to know' is fulfilled upon reaching such a fair and just result which is then publicly conveyed.

"The quasi-judicial function, wherever it is exercised, is 'primarily' and indeed totally involved at that moment by any such board, commission or agency. The quasi-judicial board must therefore be allowed such independence as may be necessary to meet the minimum criteria of due process. This is my earlier and fundamental premise for allowing the free exchange in such bodies' deliberations on matters of a judicial nature. Although such quasi-judicial boards are not a part of the judicial branch of government, their independence in making decisions must be preserved."
278 So.2d at 265. (Dissent)

The Court in Jordan v. District of Columbia, (D.C. Ct. of App., Aug. 3, 1976), 362 A.2d 114, specifically rejected the majority position in Canney, supra, and accepted the dissenting opinion. A metropolitan police department's denial of an application for a license to carry a concealed pistol was affirmed by the board of appeals and reviewed at a nonpublic conference, of which no transcript was made. The petitioner-applicant argued, in addition to other points, that the board failed to comply with the "Sunshine Act." The Court rejected the argument by stating that the statute pertains to all official actions of an executive or legislative nature, but does not apply to adjudicatory-type hearings. The Court was not persuaded by Canney, supra, in which a statute similar to the one in question was held to apply to quasi-judicial as well as quasi-legislative deliberations. The Court agreed with the Canney dissent and quoted at length from the minority opinion. The Court concluded by stating that:

> "There can be no question that the case before us for review was an agency adjudicatory proceeding, in contradistinction to a legislative or quasi-legislative action. Cf. Hotel Association v. District of Columbia Minimum Wage and Industrial Safety Board, D.C. App., 318 A.2d 294 (1974). As it is our considered opinion that the deliberative process incident to final orders in such proceedings is not covered by the so-called 'sunshine' amendment, it follows that the challenged orders in this case are not defective either because the Board members arrived at their decision at a nonpublic conference or because no transcript of such conference was made... ."
> 262 A.2d at 119.

The holding in Jordan, supra, on this point was followed and cited as controlling in: Bernstein v. District of Columbia Board of Zon

Adjustment, (D.C. Ct. of App., July 13, 1977) 376 A.2d 816; Dupont Circle Citizens Assoc. v. D.C. Board of Zoning Adjustment, (D.C. Ct. of App., 1976) 364 A.2d 610.

The Court in Dupont Circle Citizens Assoc., supra, reviewing orders of the Board of Zoning Adjustment made in a closed executive meeting allegedly in violation of the "Sunshine Act," followed Jordan, supra, and said that:

> "The quasi-judicial function of an administrative agency differs completely from the nature of its other activities. The personal and property rights of the parties, at issue in such proceedings, can only be protected, under the American system, in a judicial atmosphere that assures freedom of expression to each deciding official and encourages a free discussion and exchange of views which is so essential to frank and impartial deliberation.
>
> "This court recently interpreted the Sunshine Act in Jordan v. District of Columbia, D.C. App., 362 A.2d 114 (1976). We held there that to open all meetings to the public would effectively prevent the frank exchange of views in private among members of quasi-judicial agencies in reaching a decision--thus putting them on an entirely different footing from appellate courts and juries--to say nothing of federal administrative agencies--where experience has shown that the free flow of discussion unimpeded by the presence or reactions of the parties to the controversy has encouraged fair and just results. 362 A.2d at 117.
>
> "The Jordan decision is controlling as to the application of the Sunshine Act."
> 364 A.2d at 613,614.

The Court held that there was no violation of the "Sunshine Act" in that the Act was not applicable to quasi-judicial functions of an administrative agency or board.

The Court in Arizona Press Club, Inc., v. Arizona Board of Tax Appeals, Div. 1 (1976), supra, also fully accepted the Canney dissent. Members of the Board of Tax Appeals had a procedure whereby they heard the parties in open forum, took the matter under advisement, deliberated, wrote a decision, then made that decision available to parties and the public. The Court determined that the Board was involved in a "judicial proceeding" within the meaning of a statutory provision that provisions of the open meeting law shall not apply to any judicial proceeding, and that the term "judicial proceeding" within the Act includes administrative agency judicial proceedings. The Court, in quoting Batty v. Arizona State Dental Board, 57 Ariz. 239, 112 P.2d 870 (1941), stated that an administrative agency may be said to have quasi-judicial power in that it possesses both judicial and administrative powers. It is important to note that Batty applied the Utah rule of administrative agencies exercising quasi-judicial functions. The Court said that:

> "We do not believe that the legislature intended to exempt only court 'judicial proceedings' and not administrative agency 'judicial proceedings.' To allow the public to attend the deliberations leading to a decision and to watch the writing of that decision would not, we believe, promote the ends of justice. We agree with the dissent of Justice Dekle in the case of Canney v. Board of Publ. Instruction of Alachua Cty., 278 So.2d 260 (Fla. 1973)... ." 558 P.2d at 699.

The Court held "that the exemption in the open meeting law as to judicial proceedings applies to the Arizona Board of Tax Appeals when they are acting judicially, and that the open meeting law does not require the Arizona Board of Tax Appeals to deliberate and make their decisions in public."

The Oklahoma Supreme Court, in Stillwater Savings & Loan Association v. Oklahoma Savings and Loan Board (1975), 534 P.2d 9, in reviewing a decision of the Oklahoma Savings and Loan Board made in a meeting where the appellant was not present nor advised of, determined that the "Open Meeting Law" does not include hearings before the Board when it acts in a quasi-judicial manner in an individual proceeding. The Court reasoned that there is no need for the "decision" to be reached in open session, and that the final decision, being quasi-judicial action, is not required to be reached in an open meeting.

The concurring judge in State of Missouri ex rel. Phillip Transit Lines, Inc. v. Public Service Commission (1977), 552 SW 2d 696, 703, stated that:

> "... I wish to expressly reserve the right to decide, when it is presented, the question whether the Sunshine Law applies in situations where the Commission is exercising a quasi-judicial function and constitutional rights of privacy and due process are involved. See dissenting opinion of Dekle, Justice, in Canney v. Board of Public Instruction of Alachua County, Florida, 278 So.2d 264 (Fla. 1978)."

The majority, without discussion, agreed with the Public Service Commission's position in its brief that the Open Meetings Law applies to it.

Various Law Review articles have dealt with the issues before this Court. In addition to the Harvard Law Review article, cited, supra, 68 Northwestern Univ. Law Review 480, 1973, provides:

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481-482 "We must concede, however, that there are limits to 'Government in the Sunshine,' especially in the early

> stages of working out a particular problem. It makes a good deal of sense for any governmental body to retain a zone of privacy within which its members can air internal disagreements. A position, once publicly taken, is not easily changed; and it seems undesirable to encourage the adoption of 'first thoughts' by requiring that all collective governmental thinking be done in public. Few subordinates would feel free to offer constructive ideas for fear of appearing to be in opposition to the eventual decision of the final authority. The value competing against 'a right to know' then is not a 'right to secrecy,' but an assurance of some insulation from the intense heat of public pressure. Priorities must be determined, decisions made, and programs implemented. Absolute openness will detract from the overall public interest in informed and rational governmental decisions."

CONCLUSION

It is undeniable that the Commission performs functions which are quasi-judicial in nature. The Open Meetings' Act, by its own terms, does not reach judicial and quasi-judicial functions. Furthermore, case law in other jurisdictions indicates that quasi-judicial bodies cannot be compelled to open deliberations to the public. It should also be noted that the Harvard Law Review article cited above specifically recommends that quasi-judicial bodies be exempted from open meeting acts.

Exposure of Commission deliberations to the pressures of the public would severely limit the free flow of ideas and discussion essential among deliberating commissioners and would compromise the quality of decisi to the detriment of citizens of Utah. Such a limitation may very well give rise to a denial of due process of law to the parties before the Commissio It is of interest to note that the Founding Fathers conducted the deliberations leading to the Constitution of the United States in secret:

"... The debates were secret, and fortunately so, for criticism from without might have imperilled ... /the/ work ... so great were the difficulties encountered from the divergent sentiments and interests of different parts of the country... ." I Bryce, The American Commonwealth 24 (2d ed. 1908))

Finally, the Legislature has expressed an intention that the Commission keep certain information secret, whenever the Commission deems it in the public interest. This statute must be read consistently with the Open Meetings' Act. The District Court Ruling should be reversed.

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